IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.209 OF 2005
IN
APPEAL (LD) NO.868 OF 2004
IN
SUIT NO.2519 OF 1990

Rashmin Kantilal Pattani ...Appellant

vs.

Suresh Gole & Ors. ...Respondents

Mr.P.B.Shah with Mr.Rajeev Matkar for the Applicants
Mr.R.R.Arolkar for the Respondent No.10.

CORAM: KSHITIJ VYAS,C.J.and A.S.OKA,J.
DATE : JUNE 22,2006

P.C.:

1. We have heard Shri Shah in support of the Notice of Motion. We have also heard Shri Arolkar who has vehemently opposed the Notice of Motion. The prayer in the Notice of Motion is for condonation of delay in preferring an Appeal against the decree dated 28th June 1996 in Suit No.2519 of 1990 as amended by further Order dated 19th December 2003. According to the Appellant, the delay is of about two years. According to the Respondents the delay is of more than eight years.

2. The Appellant is the original Defendant No.10 and the Respondent No.10 is the original Plaintiff. The case of the Appellant is that at the relevant time he was staying at Sangli and was carrying on a business at Sangli. He had given

a Power of Attorney to his father to take necessary steps in the suit. According to his case his father had engaged Shri Maheshwari, Advocate to appear for him in the suit. The Advocate appeared on 16th April 1996 by recording an undertaking to file Vakalatnama. According to the Appellant though the Vakalatnama was given to the said Advocate, he did not appear in the suit. Appellant's father was regularly in touch with the said Advocate and in December 1996, the said Advocate informed the Appellant's father that there was some adverse order passed in the suit. According to the Appellant, Shri Maheshwari had expressed his inability to take further steps in the matter and he introduced the Appellant's father to Shri Khandeparkar, Advocate who agreed to accept the brief and take necessary steps. According to the case of the Appellant a total sum of Rs.7,500/- was paid to Shri Khandeparkar by way of his fees in December 1996. According to the Appellant, his father visited this court and signed the documents prepared by Shri Khandeparkar. Advocate Khandeparkar informed his father that it will require few years to reach the matter for hearing.

3. According to the case of the Appellant, his parents shifted to Pune in the year 2000 and therefore the Appellant himself started contacting his Advocate on telephone. According to him, further amount of Rs.2,000/- was paid by him to the Advocate from the Bank Account of his father. In

connection with some other suit filed against him, the Appellant's father had engaged Shri Matkar, Advocate. The Appellant used to visit this court in connection with the said suit. At that time, he made enquiry in the office of this Court with the help of a Clerk when he was shocked to know that the suit was decided exparte against him on 28th June 1996. He again contacted his Advocate Shri Khandeparkar who told him not to worry. According to the Appellant, on 7th January 2004 he signed an Affidavit by visiting this Court. According to him, he paid a further sum of Rs.5,000/- by a cheque to the said Advocate. The Appellant collected a copy of Notice of Motion No.150 of 2004 and an Affidavit in support of Notice of Motion from Advocate Khandeparkar. As the Appellant was not satisfied with the services rendered by the said Advocate, he obtained no objection certificate from the said Advocate and entrusted the matter to a new Advocate. After the matter was entrusted to the new Advocate, it was realised that exparte decree passed in the suit was modified by Judge's Order dated 7th December 2003. The new Advocate advised the Appellant to withdraw the Notice of Motion as the same was not maintainable and he was advised to prefer the present Appeal along with a Notice of Motion for condonation of delay.

4. The Respondent No.10 (original Plaintiff) filed a reply and contended that the Judge's Order passed on 17th December

2003 is passed only for correcting an accidental error and therefore the said order will not give a cause of action to the Appellant to file an Appeal. It is submitted that the Appellant's father was all along aware from December 1996 that the exparte decree has been passed and this is very clear from the copy of Affidavit dated 13th December 1996 which is annexed to the Affidavit in support of Notice of Motion for condonation of delay. It is submitted that there is a gross delay of eight years which is not at all explained and the Appellant is trying to shift the entire blame on his Advocate. It is submitted that the present Notice of Motion is taken out only to defeat the execution of the Decree.

5. The learned Counsel for the Appellant invited our attention to the various documents on record and submitted that there was no negligence on the part of the Appellant and the delay is caused due to default of his Advocate. He, therefore, submitted that sufficient cause was made out for condonation of delay. On the other hand, the learned Counsel for the Respondent No.10 submitted that there is a gross negligence on the part of the Appellant and his father and that there is no ground for condonation of delay. He placed reliance on the decision of the Apex Court in case of Salil Datta Vs. T.M.and M.C. Pvt.Ltd. [(1993) 2 S.C.C. page 185]. He submitted that there is absolutely no explanation for delay of eight long years and therefore, no case is made

out for condonation of delay.

6. We have considered the submissions. From the documents on record, it appears that the services of Shri Khandeparkar were engaged in December 1996 by the Appellant and fees of Rs.5000/- by a cheque and Rs.2500/- by cash was paid to him. There is further payment of Rs.2,000/- by a cheque made on 7th March 2001 to Shri Khandeparkar. Thereafter a further amount of Rs.5000/- appears to have been paid to the said Advocate by a cheque which was encashed on 9th January 2004. The order dated 16th April 1996 also shows that the Appellant had earlier engaged services of Shri Maheshwari, Advocate to defend the suit. To the Affidavit in support of this Notice of Motion, the Appellant has annexed a copy of the Affidavit which was got signed from the Appellant's father in the year 1996. The said Affidavit appears to have been made in support of Notice of Motion for setting aside the exparte decree. It is true that the said Notice of Motion was not filed in the year 1996. However, all these facts indicate that the Appellant had engaged services of an Advocate to defend the suit and thereafter, at the instance of the said Advocate, he engaged services of another Advocate for taking out proceeding for setting aside exparte decree. A copy of the Affidavit of the year 1996 which is annexed to the Affidavit in support of Notice of Motion shows that in December 1996 the Advocate had drafted the Notice of Motion for setting aside the exparte

decree. Unfortunately, the Notice of Motion was not filed till 2004. Subsequently the Appellant was required to withdraw the Notice of Motion as the same was not maintainable. Thus, the material on record indicates that the the Appellant has taken steps from time to time by engaging services of Advocates. Unfortunately, appropriate proceedings were not filed at appropriate time by the concerned Advocate. Therefore, it cannot be said that the Appellant was negligent. The material on record shows that the Appellant and his father were in touch with the Advocate all along from the year 1996. They had paid some amount by way of fees to the Advocate from time to time. Therefore, this is not a case where negligence can be attributed against the Appellant. It is well settled position of law that a liberal approach is required to be adopted while considering an Application for condonation of delay under section 5 of the Limitation Act, 1963. An occasion for applying for the condonation of delay arises only when there is some default on the part of a litigant. If there is no negligence on the part of the litigant, the delay is required to be condoned. The decision relied upon by the learned Counsel for the Respondents in case of Salil Datta (supra) will not have any application as in the facts of the case before the Apex Court the defendant was a private Limited company and considering the peculiar facts of the case before it, the Apex Court held that conduct of the Defendant was found to be non-cooperative with the Court and therefore the

Defendant was not entitled to any relief. This Judgment will not help the case of the Respondent.

7. The learned Counsel appearing for the Respondent No.10 submitted that the Appellant has not filed any complaint against the concerned Advocate with the Bar Council. In the present Notice of Motion we are concerned with the question whether the Appellant has made out sufficient cause for condonation of delay. We are not really concerned with the alleged misconduct on the part of any Advocate. We are of the view that the sufficient cause is made out for condonation of delay. Once sufficient cause is made out, the length of delay is not material. It is true that some prejudice will be caused to the Respondent No.10 by condoning the delay of eight years and more. However, the said Respondent can be compensated by ordering payment of costs. In this case, the costs will have to be quantified at Rs.10,000/-. It is made clear that we have considered the factual aspects only for limited purposes of considering the prayer for condonation of delay and we may not be understood to have recorded any finding about misconduct on the part of any Advocate.

8. Hence, I pass the following order :

. Notice of Motion is made absolute in terms of prayer clause (a) subject to the Appellant paying costs of Rs.10,000/- to

the Respondent No.10 within a period of six weeks from today. The payment of costs will be a condition precedent. If the compliance is made by the Appellant, office will place the Appeal for admission before the appropriate court.

CHIEF JUSTICE

ABHAY S.OKA,J.